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Supreme Court of the United States

OCTOBER TERM, 1956

No. 629

ROSLYN GREENFIELD and JOSEPH RAE,

Petitioners,

against

L. K. LAND CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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and
FRANK LEAVITT,
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Supreme Court of the United States

OCTOBER TERM, 1956

No.....

ROSLYN GREENFIELD and JOSEPH RAE,

Petitioners,

against

L. K. LAND CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, ROSLYN GREENFIELD and JOSEPH RAE, respectfully pray for a writ of certiorari to the Court of Appeals of the State of New York, to review the order of that Court, filed July 11, 1956, which (*a*) reversed the order of the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department, (*b*) reinstated the order of the Supreme Court at Special Term, Kings County, and (*c*) remitted the proceedings to said Appellate Division. By order dated August 8, 1956, said Appellate Division made as its own the order of the Court of Appeals.

The first order of the Appellate Division (R. 73), dated December 29, 1955, unanimously reversed an order of the Supreme Court at Special Term, Kings County, which granted a motion by respondent for an order striking out petitioners' answers asserting the Statute of Limitations as a complete defense.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 1 N. Y. 2d 465, 154 N.Y.S. 2d 32. It is printed in full at pages 19-24 of the "Appendix" to this petition.

The opinion of the Appellate Division of the Supreme Court is reported in 1 App. Div. 2d 699, 147 N.Y.S. 2d 463. It is printed in full at pages 25-26 of said "Appendix."

The opinion of the Supreme Court at Special Term, Kings County, has not been reported. It is printed in full at page 27 of said "Appendix."

Jurisdiction

The decision and order of the Court of Appeals of the State of New York, sought to be reviewed, operate (1) to deny to petitioners the equal protection of the laws and (2) to deprive them of their property without due process of law.

The said order of the Court of Appeals is dated July 11, 1956 and was filed in the office of the clerk of said Court the same date, (Appendix, p. 15, *ante*).

The order of the Appellate Division of the Supreme Court for the Second Judicial Department, entered on the remittitur from the Court of Appeals, is dated August 8, 1956 (Annexed to Record). Said order and remittitur were

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filed in the office of the clerk of the County of Kings on September 5, 1956.

By notice of motion dated September 18, 1956, petitioners moved said Court of Appeals for an order granting reargument of the appeal and reinstating the order of the Appellate Division dated December 29, 1955. This motion was denied on October 11, 1956 (Appendix, p. 18, *ante*).

The jurisdiction of this Court is invoked under 28 U.S.C.A., section 1257, subd. 3, as amended by the Act of June 25, 1948, C. 646, Stat. 929.

Question Presented for Review

Does the decision of the New York Court of Appeals operate to deny to petitioners the constitutional guarantees of the Fourteenth Amendment?

Constitutional Provisions and Statutes Involved

These are printed in the "Appendix," pages 28-35, *ante*.

Summary Statement of Matters Involved

The sole question presented in the state Courts, in this action to foreclose certain "transfers of tax liens," was whether the action is subject to the bar of the six-year statutes of limitation. N. Y. Civil Practice Act (hereinafter abbreviated "C.P.A."), sections 47-a, 48, subd. 2.

The transfers of tax liens were sold by the City of New York in November, 1943 (R. 23-31). The amount thereof became due in November, 1946, three years after they had been sold. Adminstrative Code of the City of New York (hereinafter termed "Code"), section 415(1)-36.0. Such transfers are made pursuant to provisions authorizing the

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City to sell its right to receive taxes, assessments and water rents, and the lien thereof. The instrument of sale or assignment is called "transfer of tax lien." Code, sec. 415(1)-23.0.

The Code (sec. 415[1]-39.0) gives a private purchaser a single remedy for the enforcement of this statutory liability of the owner of the realty affected, namely, foreclosure, and provides that "Except as otherwise provided in this title an action to foreclose a tax lien shall be regulated by the provisions of the Civil Practice Act and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property." There is no provision "otherwise" in the Code as to a limitation of time within which to commence such an action.

However, the Code contemplates a statute of limitations. It provides that if a transfer of tax lien is unenforceable, the purchaser is entitled to a return of the consideration be paid the City for it, plus certain interest (sec. 415[1]-47.0); but that no claim may be made under that section "unless action to foreclose the tax lien or transfer of tax lien upon which such claim is founded be commenced within five years from the time of the sale resulting in such transfer of tax lien" (sec. 415[1]-50.0).

Respondent, holder of eleven transfers of tax liens, commenced the present foreclosure action in February, 1955 (R. 23-37), eight years after the causes of action accrued. Petitioners, in their answers, set up the six-year statutes of limitations as a complete defense (R. 41, 45), urging the applicability of the statute governing actions "upon a liability created by statute" (C.P.A., sec. 48, subd. 2) and the statute governing actions upon a mortgage of real property (C.P.A. sec. 47-a).

Respondent moved to strike the answers (R. 13-22), urging that the action was not subject to any statute of limitations because of the provisions of the City Charter (sec. 172) and the Code (sec. 415[1]-7.0) that all taxes

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on real estate are liens thereon and remain such "until paid";* and upon this ground the Supreme Court at Special Term granted the motion (R. 53; Appendix, p. 27, *ante*).

The Appellate Division unanimously reversed the lower Court. It held that an action to foreclose a tax lien is governed by subdivision 2 of section 48 (C.P.A.), which provides that an action to recover on a liability created by statute, except a penalty or forfeiture, must be commenced within six years after the cause of action has accrued. The Court therefore found it unnecessary to decide whether it was intended, in section 415(1)-39.0 of the Code, to make the provisions of section 47-a (C.P.A.) applicable to such a foreclosure action.

The opinion of the Appellate Division states (*L. K. Land Corp.* v. *Gordon et al.*, 1 A. D. 2d 699, 147 N.Y.S. 2d 463, 465; Appendix, p. 25, *ante*):

> "The power to tax is wholly statutory and the remedies provided for the collection of taxes, whether by action or otherwise, are also dependent on statutory authority. (Citing cases.)
>
> The fact that taxes continue to be liens on the real estate affected until paid, (citing statutes), does not prevent the operation of the Statute of Limitations to bar an action for the enforcement of the liens. That statute does not pay, destroy or discharge the lien, but affects only the remedy. (Citing cases.)"

Respondent appealed, by leave of the Appellate Division, on a certified question as to the propriety of the Court's

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*It should be borne in mind that the City, upon the sale of a tax lien or transfer of tax lien to a private purchaser, receives payment in satisfaction of the tax arrears on the realty affected. Such sale results in the discharge of the tax arrears on the City's records. Code, section 415(1)-37.0. See also, section 415(1)-29.0.

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order of reversal (R. 67-71). The Court of Appeals answered this question in the negative, reversed the order of the Appellate Division and reinstated the order made at Special Term. The Court said that while "there is no provision of law specifically limiting the time for the institution of such an action" (to foreclose a transfer of tax lien), the City Charter (sec. 172) and the Code (sec. 415(1)-7.0) "expressly recite that all taxes shall become liens on the real estate affected thereby * * * and shall remain such liens until paid." The Court then held (*L. K. Land Corp.* v. *Gordon et al.*, 1 N. Y. 2d 465, 154 N.Y.S. 2d 32, 36; Appendix, pp. 23-24, *ante*):

> "Plaintiff (respondent here) stands in the same position as the City with respect to his rights and remedies as a holder of a tax lien (citing statute and case); if his remedy of foreclosure were subject to the statute of limitations, so too would be the City's as to the liens that it holds. But it is clear to us that the provisions in the New York City Charter and in its Administrative Code, that the lien of a real estate tax continues until paid, are specific pronouncements which were not intended to be overridden by general, state-wide statutes of limitation."

The plain errors (as we contend) in such premise and conclusion of the Court of Appeals will be pointed out later.

The Manner in Which the Federal Question Sought to Be Reviewed Was Raised

The federal question arose when the Court of Appeals reversed the Appellate Division and held that the defense of the statute of limitations was not available to petitioners. Thereupon petitioners made application to said Court for reargument, urging (among other things) that

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the effect of the decision was to deny to them the constitutional guarantee of the equal protection of the law. This application was denied without opinion on October 11, 1956 (Appendix, p. 18, *ante*).

Judgment was granted against petitioners without a trial, although the Appellate Division found that petitioners "have shown facts entitling them to defend the action" (Appendix, p. 26, *ante*). They had prevailed in the Appellate Division and could not contemplate the decision of the Court of Appeals. The motion for reargument in the Court of Appeals therefore was petitioners' first opportunity to raise the federal question now sought to be reviewed.*

Argument

The decision of the New York Court of Appeals operates to deny to petitioners the constitutional guaranties of the Fourteenth Amendment.

A. This Court has repeatedly held that judicial acts of state Courts are subject to the proscriptions of the Fourteenth Amendment. In *Shelley* v. *Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 842, Mr. Chief Justice Vinson, writing for the Court, stated:

> "In the Civil Rights cases, 1883, 109 U.S. 3, 11, 17, 3 S. Ct. 18, 21, 27 L. Ed. 835, this Court pointed out that the Amendment makes void 'state action of every

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* In *Saunders* v. *Shaw et al.*, 244 U. S. 317, 320, this Court (per HOLMES, *J.*) held:

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record. It would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or take other precautions in advance. The denial of rights given by the Fourteenth Amendment not need be by legislation."

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kind' which is inconsistent with the guaranties therein contained, and extends to manifestations or 'state authority, in the shape of laws, customs, or judicial or executive proceedings.' "

Whether a specific act violates the constitutional guaranties is to be determined not only by its provisions but, also, by its operation and application. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064. It is also the province of this Court to review a decision of a state court of last resort, where the operation of such decision deprives a litigant of rights guaranteed by the Constitution. *Shelley* v. *Kraemer, supra; Saunders* v. *Shaw, supra.*

Here, the Civil Practice Act, in subdivision 2 of section 48, expressly states that "an action to recover upon a liability created by statute, except a penalty or forfeiture," "must be commenced within six years after the cause of action has accrued." This section has been applied to numerous liabilities created by statute, including—but not limited to—the Labor Law (*Schmidt* v. *Merchants Dispatch Transp. Co.*, 270 N. Y. 287), Workmen's Compensation Law (*Detmar* v. *Nussbaum*, 149 Misc. 469, affd. 241 App. Div. 720), Stock Corporation Law (*Shepard* v. *Taylor Publishing Co.*, 234 N. Y. 465), Sherman Anti-Trust Act (*Seaboard Transportation Co.* v. *Standard Oil Co.*, 24 Fed. Supp. 1018, affd. 104 Fed. 2d 659).

The statute does not distinguish between a statutory liability created by a transfer of tax lien and other liabilities created by a statute. Persons liable under all such statutes (except those involving a penalty or forfeiture) are similarly situated, and all are entitled equally to the protection of section 48, subdivision 2, of the Civil Practice Act.

The defense of the statute of limitations is a valuable right; it is considered by this Court to be a matter of substance and not merely as something technical. *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 43 S. Ct. 100.

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Such statutes are matters of important public policy and are vital to the welfare of society. *Wood* v. *Carpenter*, 101 U. S. 135, S. Ct. .

Indeed, in matters involving title to property, the expiration of the statute of limitations has been held by this Court to vest property rights which are subject to the due process provisions of the Fourteenth Amendment. *Stewart* v. *Keyes*, 295 U. S. 403, 417, 55 S. Ct. 807, 813:

> "As respects suits to recover real or personal property where the right of action has been barred by a statute of limitations and a later act has attempted to repeal or remove the bar after it became complete, the rule sustained by reason and preponderant authority is that the removing act cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law. 'The reason is', as this Court has said, 'that by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title would be to deprive him of his property without due process of law.' "

The decision of the Court of Appeals, denying petitioners the benefit of the statute of limitations after its expiration, is no less a deprivation of constitutional rights than is a statute reviving a cause of action after expiration of the statute of limitations.

The importance of the question is emphasized by the fact that one immediate effect of the decision of the Court of Appeals will be to upset titles to real property in New York City, in existence since the decision in *Santasieri* v. *Crane*, 175 Misc. 375, 23 N.Y.S. 2d 455, decided in 1940, holding that the statute of limitations is applicable to actions like the one here involved.

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B. The statute of limitations "ought not to be explained away." *Clementson* v. *Williams*, 8 Cranch. 72, 3 L. Ed. 491. Here, the grounds upon which the decision of the Court of Appeals seeks to explain away the statute of limitations are completely erroneous; for there is no basis whatsoever for the basic propositions in the decision that the respondent "stands in the same position as the City with respect to his rights and remedies as a holder of a tax lien (Administrative Code, sec. 415[1]-33.0, subd. [c])," and that "if his remedy of foreclosure were subject to the statute of limitations, so too would be the City's as to the liens that it holds."

The statute cited relates, not to tax liens held by the City, but to "transfers of tax liens" which the City acquires and later sells. Subdivision (c) gives the purchaser, not the rights and remedies of the City as holder of a tax lien, but only those of a holder of a "transfer of tax lien."

The rights of such purchaser and holder of a transfer of tax lien are expressly stated in section 415(1)-36.0 of the Code: (1) the right to recoup the amount of the tax plus interest from the date of the sale at the rate which he bid; and (2) the right to call in the aggregate amount if the property owner defaults for thirty days in the payment of interest, or defaults for six months in the payment of subsequent taxes. The City's rights are much broader.

While a lien held by the City for unpaid taxes continues "until paid," a transfer of tax lien is subordinate and "subject to the lien for and right of the City to collect and receive all taxes, assessments and water rents which accrued or which became a lien on and after the day of the date mentioned in the first advertisement of such sale (of the transfer of tax lien) as stated therein." Code, sec. 415(1)-31.0. Under this statute a transfer of tax lien can be and frequently is wiped out by the foreclosure of a transfer of tax lien for subsequent taxes, and thus barred *without payment*.

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While, under the Code, foreclosure is the sole remedy of a private holder of a transfer of tax lien, Section 415(1)-39.0, the City—as holder of such a transfer—has a choice of remedies: (1) to foreclose the transfer of tax lien, Section 415(1)-33.0, subd. (a); and, of far more importance to the City, (2) to cancel the transfer and thereby reinstate its lien "as if no sale for such unpaid tax, assessment or water rent had been made," Section 415(1)-24.0,–thus preserving for itself the protection of the statutory provisions that its liens for unpaid taxes shall remain such "until paid." A private holder of a transfer of tax lien, as is the respondent, has no such important right or remedy.

It seems clear from the foregoing that the denial to petitioners of the equal protection of the six-year statute of limitations, results from basic errors of the Court of Appeals in its decision; and it furnishes another reason for the granting of this petition.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutional question presented may be settled and determined. This is especially important because, as was pointed out, the immediate effect of the decision of the Court of Appeals will be to upset titles to real property in existence since *Santasieri* v. *Crane* (*N. Y.*), *supra*, 175 Misc. 375, 23 N.Y.S. 2d 455, decided in 1940.

Wherefore, your petitioners respectfully pray for a writ of certiorari to be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding said Court to certify and to send to this Court, on a date to be designated, a full and complete transcript of the record and of all proceed-

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ings by the Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order of the Court of Appeals may be reversed, and that petitioners be granted such other and further relief as may be just and proper.

ROSLYN GREENFIELD and JOSEPH RAE,
Petitioners,

By HAROLD TURK,
Attorney for Petitioners.

HAROLD L. TURK and
FRANK LEAVITT, Esqs.,
Of Counsel.

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APPENDIX

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Order of Court of Appeals Reversing Order of Appellate Division and Reinstating Order of Special Term.

No. 79

COURT OF APPEALS

State of New York, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of July in the year of our Lord, one thousand nine hundred and fifty six, before the Judges of said Court.

Witness,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur July 11, 1956.

Order of Court of Appeals Reversing Order of Appellate Division and Reinstating Order of Special Term.

No. 79

L. K. LAND CORPORATION,

Appellant,

v.

DORA GORDON, & ORS.,

Defendants,

and

ROSLYN GREENFIELD, & ano.,

Respondents.

BE IT REMEMBERED, That on the 9th day of March, in the year of our Lord one thousand nine hundred and fifty six, L. K. Land Corporation, the appellant—in this cause, came here unto the Court of Appeals by Siegel & Markel, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Roslyn Greenfield, & ano., the respondents in said cause afterwards appeared in said Court of Appeals by Markewich, Rosenhaus & Beck, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frank Kreitzberg, of counsel for the appellant,—and by Mr. Robert Markewich, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate

Order of Court of Appeals Reversing Order of Appellate Division and Reinstating Order of Special Term.

Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term reinstated, with costs in this Court and in the Appellate Division. Question certified answered in the negative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed &c. Question certified answered as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Order of Court of Appeals Denying Motion for Reargument.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the eleventh day of October A.D. 1956.

Present, HON. ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 418

L. K. LAND CORPORATION,

Appellant,

v.

DORA GORDON, & ors.,

Defendants,

and

ROSLYN GREENFIELD, & ano.,

Respondents.

A motion for a reargument of the above cause having been heretofore made upon the part of the respondents herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

GEARON KIMBALL,
Deputy Clerk.

(SEAL)

Opinion of New York Court of Appeals.

(1 N.Y. 2d 465, 154 N.Y.S. 2d 32)

FULD, J. The sole question presented, in this action to foreclose certain transfers of tax liens, is whether the suit is subject to the bar of the six year statute of limitations, Civil Practice Act, §§ 47-a, 48, subd. 2.

The liens in question were sold by the City of New York, in November, 1943, to plaintiff or to others from whom plaintiff subsequently acquired them. The transfers were made pursuant to the Administrative Code provisions authorizing the sale by the City of the "right * * * to receive taxes, assessments * * * and the lien thereof", Administrative Code of City of New York, § 415(1)-23.0. A transfer of tax lien operates "to transfer and assign the tax lien" to the purchaser, § 415(1)-31.0, who has "all the rights and remedies of a holder thereof" § 415(1)-33.0, subd. c.

Plaintiff instituted the present suit in February, 1955, eight years after the cause of action had accrued.[1] Defendants, in their answers, set up the six-year statute of limitations as a complete defense, urging the applicability of either the statute governing actions "upon a liability created by statute", Civ. Prac. Act. § 48, sub. 2, or the one governing actions "upon a mortgage of real property, or any interest therein", § 47-a. Plaintiff moved to strike the answers, urging that the action was not subject to any statute of limitations because of the provision in both City Charter and Administrative Code that taxes are to become and remain liens "until paid", New York City Charter, § 172; Administrative Code, § 415(1)-7.0.

Plaintiff's motion to strike was granted by the court at Special Term, but the Appellate Division unanimously re-

[1] The amount of the liens became due in November, 1946, three years after they had been sold, Administrative Code, § 415(1)-36.0.

versed. The appeal is before us, by leave of the Appellate Division, upon a certified question.

[1] Whether there should be any limitation of the time in which an action to foreclose tax liens must be instituted is, of course, a question for legislative decision. Cf. Gautier v. Ditmar, 204 N.Y. 20, 28, 97 N.E. 464, 467. There is no provision of law specifically limiting the time for the institution of such an action. On the contrary, as plaintiff maintains, the City Charter expressly recites that *all taxes shall "become liens* on the real estate affected thereby * * * *and shall remain such liens until paid"*, § 172, and the Administrative Code is just as explicit, § 415(1)-7.0.[2]

Defendants contend, though, that the obligation to pay taxes is a "liability created by statute" and, by that token, subject to the six-year limitation imposed by subdivision 2 of section 48 of the Civil Practice Act upon actions to enforce such a liability. Furthermore, they argue, even if section 48, subdivision 2, were to be held inapplicable, the suit would still be barred by section 47-a of the Civil Practice Act, requiring actions "upon a mortgage of real property" to be commenced within six years. For this proposition they rely upon section 415(1)-39.0 of the Administrative Code, which specifies that "Except as otherwise provided in this title an action to foreclose a tax lien shall be regulated by the provisions of the civil practice act and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property."

The court at Special Term concluded that the Charter and Code provisions continuing the liens in effect until

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[2] The Administrative Code provision, § 415(1)-7.0, differing slightly in wording, declares that "All taxes and all assessments * * * and the interest and charges thereon * * * shall continue to be, until paid, a lien".

paid rendered inapplicable the statutes of limitation prescribed by the Civil Practice Act. The Appellate Division, however, without stating whether section 47-a or section 48, subdivision 2, was controlling, held that the action was barred under either the one or the other. It found no conflict between its decision and the recitals, above noted, that the liens remain until paid, because the statute of limitations "does not pay, destroy or discharge the lien, but affects only the remedy. Cf. Hulbert v. Clark, 128 N.Y. 295, 28 N.E. 638, 14 L.R.A. 59; House v. Carr, 185 N.Y. 453, 78 N.E. 171, 6 L.R.A.,N.S., 510; Campbell v. Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L. Ed. 483." [1 A.D. 2d 699, 147 N.Y.S. 2d 465.]

Although there are a number of decisions in other jurisdictions—reaching divergent results, holding statute of limitations inapplicable: see, e. g., City of Hartford v. Mechanics' Savings Bank, 79 Conn. 38, 63 A. 658; Greenwood v. Town of La Salle, 137 Ill. 225, 26 N.E. 1089; Wells County v. McHenry, 7 N.D. 246, 264-266, 74 N.W. 241; Iowa Land Co. v. Douglas County, 8 S.D. 491, 503-504, 67 N.W. 52; City of Port Townsend v. Eisenbeis, 28 Wash. 533, 68 P. 1045. Holding statute of limitations applicable and action barred: see, e. g., Barden v. City of Duluth, C.C., 28 F. 14; State v. Bellin, 79 Minn. 131, 133, 81 N.W. 763; Board of County Com'rs of Custer County v. Story, 26 Mont. 517, 521-522, 69 P. 56; San Francisco v. Luning, 73 Cal. 610, 15 P. 311; State of Nevada v. Yellow Jacket Silver Min. Co., 14 Nev. 220, 228-235—they help us but little, since they rest for the most part upon the particular statutory provisions and enforcement procedures involved. The answer in cases such as the one before us necessarily lies in the explicit language of the City Charter and Administrative Code declaring that the lien of a tax "shall remain" and "shall continue" until paid.

By these provisions, the law-making body clearly manifested its design that a tax liability should be enforcible against the affected property perpetually or, more accurately, until it is actually discharged by payment. Indeed, under a similar provision in the Act incorporating the City of Tonawanda, we decided that real estate tax liens might be "enforced, irrespective of the time when actions or proceedings were taken to enforce the same." County of Erie v. Lowenstein, 235 N.Y. 458, 461, 139 N.E. 573, 574. As originally enacted, the Tonawanda statute had provided that taxes were to remain a lien "for ten years from the time of filing the said assessment rolls * * * until paid or otherwise satisfied and discharged". L. 1903, ch. 22, tit. VIII, § 7. The ten-year limitation was eliminated by an amendment in 1917. Conflicting claims asserted by the City of Tonawanda and Erie County were resolved by the holding that the liens in issue had become perpetual by reason of the amendment and that the action to foreclose was not barred although the liens were more than ten years old when the action was instituted.

[2, 3] The six-year limitation of actions upon a "liability created by statute" had long been a part of the law at the time the County of Erie case, supra, 235 N.Y. 458, 139 N.E. 573, came before this court for decision, but it nevertheless held enforcible liens which arose as long as fourteen years before the action was instituted. Efficient tax administration of a particular local area may require, and the Legislature may, as in the original Tonawanda statute, provide time limitations differing from those in other tax districts, cf. Cahen v. Boyland, 1 N.Y. 2d 8, 150 N.Y.S. 2d 5, or from those in state-wide procedural statutes applicable to general legal remedies. It matters not that a tax liability may literally be considered one "created by statute". It is clear that a specific direction in the City's tax laws as to the duration of a tax lien must govern and take precedence over any more general statute of

limitations to be found in the Civil Practice Act. Such general statutes are never applicable where another statute, relating to a particular type of claim, prescribes a different limitation or indicates that there is to be no limitation. See Civ. Prac. Act, § 10; see, also, City of Port Townsend v. Eisenbeis, supra, 28 Wash. 533, 542-543, 68 P. 1045. And both the City Charter and the Administrative Code are statutes which specifically prescribe that the life and validity of a tax lien shall not be affected by the lapse of time.

[4] The recital, in section 415(1)-39.0 of the Code, that actions to foreclose a tax lien "shall be regulated by the provisions of the civil practice act" applicable to realty mortgage foreclosures is, as the Appellate Division itself intimated, nothing more than a provision for "the regulation of the procedure in such an action" having nothing to do with the problem of limitations. That statement is subject, too, to the proviso, "Except as otherwise provided in this title", and it could hardly have been meant to derogate in any way from the force of the explicit pronouncement that tax liens shall remain effective "until paid".

[5] It is no answer, to language so plain, that the statute of limitations affects only the remedy and not the right, and that it may, therefore, be applied without conflicting with the provision that the lien continues until paid. Although a few courts have, in fact, adopted this reasoning, see, e. g., Board of Com'rs of Custer County v. Story, supra, 26 Mont. 517, 521-522, 69 P. 56; State of Nevada v. Yellow Jacket Silver Min. Co., supra, 14 Nev. 220, 232, such doctrinal niceties have no place in a case such as the present. This right-persists-remedy-gone analysis is usually employed to allow a recovery after a claim has been barred, as, for example, by upholding a

legislative revival of the claim, see Campbell v. Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, or by allowing resort to an alternative remedy. See House v. Carr, 185 N.Y. 453, 78 N.E. 171, 6 L.R.A.,N.S., 510; Hulbert v. Clark, 128 N.Y. 295, 28 N.E. 638, 14 L.R.A. 59. It should not be invoked for the contrary purpose, that is, to bar the primary means of enforcing a claim despite a legislative pronouncement that the claim be perpetual, simply because other remedies, uncertain and less efficacious, may still remain.

[6] Plaintiff stands in the same position as the City with respect to his rights and remedies as a holder of a tax lien, Administrative Code, § 415(1)-33.0, subd. c; see Gautier v. Ditmar, supra, 204 N.Y. 20, 28-29, 97 N.E. 464, 467-468; if his remedy of foreclosure were subject to the statute of limitations, so too would be the City's as to the liens that it holds. But it is clear to us that the provisions in the New York City Charter and in its Administrative Code, that the lien of a real estate tax continues until paid, are specific pronouncements which were not intended to be overriden by general, state-wide statutes of limitation.

The order of the Appellate Division should be reversed, the question certified answered in the negative, and plaintiff's motion to strike defendants' answers granted, with costs in this court and in the Appellate Division.

CONWAY, C. J., and DESMOND, DYE, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

Order of Appellate Division reversed, and that of Special Term reinstated, with costs in this court and in the Appellate Division. Question certified answered in the negative.

Opinion of Appellate Division of the Supreme Court.

(1 App. Div. 2d 699, 147 N.Y.S. 2d 463)

L. K. Land Corporations, res. v. Gordon, et al, Def (Greenfield and ano. ap)—In an action to foreclose tax liens, pursuant to the provisions of the Administrative Code of the City of New York, the appeal is from an order under Rule 113 of the Rules of Civil Practice, striking out answers interposed by appellants, in which defenses were asserted that the action was not commenced within six years after the cause of action pleaded in the complaint had accrued.

Order reversed, with one bill of $10 costs and disbursements, and motion denied, with $10 costs.

Section 415(1)-39.0 of the Administrative Code provides, among other things, that an action to foreclose a tax lien shall be "regulated" by the provisions of the Civil Practice Act and all other provisions of law and rules of practice applicable to actions to foreclose mortgages on real property. Although there may be some doubt that it was intended, in enacting that section, to provide for anything more than the regulation of the procedure in such an action, we do not find it necessary to decide whether such was the legislative intent, or whether it was also intended to make the provisions of section 47-a of the Civil Practice Act applicable to such actions. If the time in which such an action may be commenced is not limited by the provisions of section 47-a, it is governed by subdivision 2 of section 48 of the Civil Practice Act, which provides that an action to recover on a liability created by statute, except a penalty or forfeiture, must be commenced within six years after the cause of action has accrued. The power to tax is wholly statutory and the remedies provided for the collection of taxes, whether by action or otherwise, are also dependent on statutory authority (City of Rochester v. Bloss, 185 N. Y. 42; City of Johnstown v. Wells, 242 App. Div. 103, aff'd 275 N. Y. 623; Village of Charlotte v.

Keon, 207 N. Y. 346, 348; Bristol v. Washington County, 177 U. S. 133; Barden v. City of Duluth, 28 F. 14).

The fact that taxes continue to be liens on the real estate affected until paid (New York City Charter (1938), sec. 172; Administrative Code of City of N. Y. sec. 415(1)-7.0), does not prevent the operation of the statute of limitations to bar an action for the enforcement of the liens. That statute does not pay, destroy or discharge the lien but affects only the remedy (cf. Hulbert v. Clark, 128 N. Y. 295; House v. Carr, 185 N. Y. 453; Campbell v. Holt, 115 U. S. 620). Whether or not the statute was tolled by the purchase of the property involved, subject to taxes (cf. Shohfi v. Shohfi, 303 N. Y. 370), may not be decided on the record presented.

City of New York v. Deering (Action No. 1), 263 App. Div. 974, is not an authority to the contrary. That action was commenced within six years after the right of action had accrued, the contention of the defendant in that case being that the action was barred because the taxes sought to be collected by foreclosure of the tax liens, had existed as liens for upwards of six years.

However, even though the action may be barred as to the principal amount of the tax liens, respondent may maintain the action to recover the interest on the tax liens which accrued during the period between a date six years prior to the commencement of the action and the termination of the limitation period as to principal. Ernst v. Schaack, 271 App. Div. 1012, aff'd 297 N. Y. 566. Under such circumstances, the statute of limitations constitutes only a partial defense and should have been pleaded as such (Civ. Prac. Act, sec. 262; Houston v. Coombs, 224 App. Div. 396, 398; Kenny v. Terwilliger, 281 App. Div. 952). However, the technical defects in appellants' answers may be disregarded on this motion under Rule 113 of the Rules of Civil Practice, since appellants have shown facts entitling them to defend the action. Curry v. Mackenzie, 239 N. Y. 267, 272.

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Memorandum Opinion of the Supreme Court at Special Term (Martuscello, *J.*).

Dated, March 25, 1955.

Plaintiff moves for summary judgment striking out similar answers interposed by the defendants Joseph Rae and Roslyn Greenfield in an action brought to foreclose transfers of tax liens purchased by plaintiff from the City of New York. The motion is granted. Defendants' general denials tender no triable issues in the absence of factual presentation. In the opposing papers the defendants set forth nothing to support the denials contained in their answers, but rely entirely on their affirmative defenses of the 6 year Statute of Limitations. That defense is unavailing to them as a matter of law. Section 172 of the New York City Charter provides that the lien of the tax persists until paid. In so far as the taxpayer is concerned, the transfer thereof does not affect its underlying nature as a tax. Gautier v. Ditmar, 204 N. Y. 20, 27.

Like defenses were stricken on motion in the City of New York v. Deering (N. Y. L. J., January 31, 1941, p. 486, col. 7, Valente, J., aff'd 263 App. Div. 974). To the same effect, see Beach Bungalows v. Bushwick Savings Bank (133 N. Y. S. 2d 712); Parrone v. Mallach (N. Y. L. J., 9/23/54, p. 9, c. 7, Keogh, *J.*)

Although defendants have cited Special Term decisions upholding the defense interposed, it is to be noted that said decisions overlooked the City of New York v. Deering (supra), which has held that the defense of the Statute of Limitations in a similar proceeding is without merit. Settle order on notice.

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Constitutional Provisions and Statutes Involved

United States Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article 1, Section 11:

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof.* * *."

New York Civil Practice Act, Section 47(a):

"Sec. 47(a). Actions on bonds and/or mortgages secured by real property to be commenced within six years.

1. An action upon a bond, the payment of which is secured by a mortgage upon real property, or upon a bond and mortgage so secured, or upon a mortgage of real property, or any interest therein, must be commenced within six years after the cause of action has accrued."

New York Civil Practice Act, Sec. 48, subd. 2:

"Sec. 48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

* * *

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2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

* * *"

New York City Charter

"Section 172. Taxes due and payable. —* * * All taxes shall be and become liens on the real estate affected thereby and shall be construed as and deemed to be charged thereon on the respective days when they become due and payable, and not earlier, and shall remain such liens until paid. * * *"

Administrative Code of the City of New York

"Section 415(1)—7.0 **When taxes, assessments and water rents to be liens on lands assessed.** —All taxes and all assessments and all water rents, and the interest and charges thereon, which may be laid or may have heretofore been laid, upon any real estate now in the city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges. * * *.

"Section 415(1)—23.0 **Sales of tax liens for taxes, water rents and assessments; proceedings.** —The right of the city to receive taxes, assessments, sewer rents and water rents and the lien thereof, may be sold by the city, and after such sale, shall be transferred in the manner provided by this title. The right and lien so sold shall be called 'tax lien' and the instrument by which it is assigned shall be called 'transfer of tax lien.'

"Section 416(1)—24.0 **Notice of sale to be published.** * * * The city collector, with the written approval of the treasurer, may cancel any certificate or lease or transfer of tax lien for unpaid taxes,

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assessments and water rents, held by the city, or to which the city has acquired the right, and upon such cancellation, the lien of such tax, assessment, sewer rent or water rent shall be and remain the same as if no sale for such unpaid tax, assessment, sewer rent or water rent had been made.

"Section 415(1)—29.0 **City may bid in on tax sale.**—If no bid shall be received for a tax lien offered for sale, the city collector for and on behalf of the city may bid in the tax lien, and upon such bid, no deposit or payment in cash shall be required from the city. When the city has bid in any tax lien, a transfer of tax lien to the city shall be executed by the city collector in the form and manner prescribed for other transfers of tax liens, and the city shall have the same rights in, to and under such transfer of tax lien as if the same had been bought by any other person.

"Sec. 415(1)—31.0 **Transfers of tax liens; operation.**—A transfer of tax lien shall operate to transfer and assign the tax lien upon the lands or tenements described therein for the taxes, assessments and water rents, and penalties, the interest thereon, and the charges of the notices and advertisements given pursuant to sections 415(1)—24.0 and 415(1)—25.0 of the code, and all other costs and charges, so advertised for sale, free of all taxes, assessments and water rents, which accrued before the day of the date mentioned in the advertisement of the sale as stated therein, and to create a lien upon the property affected thereby for the interest to which the purchaser may be entitled under his bid, but subject to the lien for and right of the city to collect and receive all taxes, assessments and water rents which accrued or which became a lien on and after the day

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of the date mentioned in the first advertisement of such sale as stated therein.

"Section 415(1)—33.0 **Sale of transfers of tax liens by the city; procedure.** *a.* In addition to the right to foreclose a tax lien or transfer thereof, and in addition to any other right or remedy given by this title for the enforcement of a tax lien or transfer thereof, the city, in the manner prescribed in this section, may sell a transfer of tax lien heretofore or hereafter bid in by it pursuant to section 415(1)—29.0 of the code.

* * *

c. A successful bidder shall receive from the city an assignment of the transfer of tax lien and shall have all the rights and remedies of a holder thereof. If no bid be received, at such sale, the treasurer shall reconsider his determination and may file a new certificate in the manner hereinbefore provided, and shall proceed again as hereinbefore provided. All sales authorized by this section shall be conducted by the city collector or by such of his subordinates as he may designate.

"Sec. 415(1)—36.0 **Rights of purchaser of tax lien.** The aggregate amount of each tax lien transferred pursuant to this title, shall be due three years from the date of the sale. Until such aggregate amount is fully paid and discharged, the holder of the transfer of tax lien shall be entitled to receive interest on such aggregate amount from the day of sale, and semi-annually on the first day of January and July, at the rate which the purchaser shall have bid, and such interest may be paid directly to the holder of such tax lien or to the city collector who shall, if such interest is paid within thirty days from due date, receive and hold the same in the redemp-

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tion fund for the benefit of the holder of the tax lien. In case such payment of interest be made to the city collector he shall give notice thereof to the purchaser or the personal representative or assignee of the purchaser, by mail addressed to such address as may have been furnished to the city collector. At the option of the holder of any transfer of tax lien the aggregate amount thereof shall become due and payable after default in the payment of interest for thirty days or after default for six months after the delivery of transfer of tax lien in the payment of any taxes, assessments or water rents, which become a lien on and after the day of the date mentioned in the advertisement of the sale as stated therein, of the tax lien transferred by such transfer of tax lien. Any person having a legal or beneficial interest in property affected by a transfer of tax lien may satisfy the same before maturity upon giving thirty days' notice in writing to the holder thereof, of the day on which payment will be made and upon payment of the principal with interest at the rate bid to a time three months after the day so fixed for payment. If notice of intention to make payment be given as herein provided, and such payment be not made, then the whole amount of any tax lien concerning which such notice shall have been given shall become due and payable at the option of the holder thereof. Or any such person may pay to the city collector such principal with interest at the rate bid up to a day six months after such payment. In case such payment be made to the city collector, he shall receive the same for the benefit of the holder of the tax lien thus discharged, and shall give notice thereof to the purchaser or the personal representative or assignee of the purchaser, by mail addressed to such address as may have been furnished to the city col-

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lector. Upon receiving surrender of such transfer of tax lien the city collector shall pay the amount thus deposited, to the person who according to the records in his office appears to be entitled thereto, or the personal representative of such person.

"Section 415(1)—37.0 **Discharge of tax lien.**—A tax lien sold pursuant to the provisions of this title must be discharged upon the record thereof by the city collector when payment is made to him of the principal and interest as provided in section 415(1)—36.0 of the code, and also when the transfer of tax lien is surrendered to him for cancellation, and there is presented to him a certificate executed by the purchaser, • • • certifying that the tax lien has been paid or has been otherwise satisfied and discharged. The transfer of tax lien thus surrendered and such certificate of discharge must be filed by the city collector and he must note upon the margin of the record of such sale, upon such transfer of tax lien and upon the copy of the transfer of tax lien kept in his office a minute of such discharge and the date of filing thereof. • • •.

"Sec. 415(1)—39.0 **Foreclosure of tax liens.**—If the amount of any tax lien which shall have been transferred by a transfer of tax lien shall not be paid when under its terms and the provisions of section 415(1)—36.0 of the code such amount shall be due, the holder of such tax lien may maintain an action in the supreme court to foreclose such tax lien. In an action to foreclose a tax lien any person shall be a proper party of whom the plaintiff alleges that such person has or may have or that the plaintiff has reason to believe that such person has or may have an interest in or claim upon the real property affected by the tax lien. Except as otherwise pro-

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vided in this title an action to foreclose a tax lien shall be regulated by the provisions of the civil practice act and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property. The people of the state of New York may be made party to an action to foreclose a tax lien in the same manner as a natural person. Where the people of the state of New York or the city of New York is made a party defendant the complaint shall set forth, in addition to the other matters required to be set forth by law, detailed facts showing the particular nature of the interest in or the lien on such real property of the people of the state of New York or the city of New York, and detailed facts showing the particular nature of the interest in or the lien on such real property which plaintiff has reason to believe that the people of the state of New York or the city of New York has or may have in such real property, and the reason for making the people of the state of New York or the city of New York a party defendant. Upon failure to state such facts the complaint shall be dismissed as to the people of the state or the city of New York.

"Section 415(1)—47.0 **Reimbursement for unenforceable tax liens or transfers of tax liens.**—If a transfer of tax lien be vacated or be set aside or canceled, or if it be adjudged in any action that a transfer of tax lien is invalid or defective, or not sufficient to transfer a tax lien to the purchaser thereof, or if in any action to foreclose a tax lien, it be adjudged that the entire tax lien is void and not a valid lien on the premises which it purports to affect, and that the complaint be dismissed, or if in any action a sale of the property is directed to be made subject to any easement and hence the amount of the lien

cannot be obtained upon sale of the property, the holder may surrender such transfer of tax lien, together with a certified copy of such judgment or decree, and also an assignment to the city of such judgment directing sale to the city collector and thereupon shall be repaid by the city the amount paid for such transfer of tax lien, with interest from the time of such payment at the rate of six per cent unless a lower rate be set forth in the transfer of tax lien, in which event at such lower rate, and the city shall pay the taxed costs and disbursements of any action or proceeding in which such adjudication is made.

"Section 415(1)—50.0 **Conditions for claims for defective tax liens.**—No claim shall be made against the city under sections 415(1)—47.0 and 415(1)—48.0 of the code by the holder of any tax lien, unless action to foreclose the tax lien or transfer of tax lien upon which such claim is founded be commenced within five years from the time of the sale resulting in such transfer of tax lien. * * *."

FILED
JAN 10 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 629

ROSLYN GREENFIELD and JOSEPH RAE,
Petitioners,

AGAINST

L. K. LAND CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Nature of Action

This is an action to foreclose certain tax liens acquired by respondent through assignment from the City of New York.

Question Presented in the State Courts

We agree with petitioner that the sole question in the State Courts was whether the action was barred by New York Civil Practice Act, Sections 47-a or 48(2) (Petition, p. 3).

State Court Decisions

Special Term (the Court of first instance), held that the defense of the Statute of Limitations was unavailable and accordingly granted judgment of foreclosure and sale (Petition, p. 27).

The Appellate Division (the intermediate appellate court) reversed but was in turn reversed by the Court of Appeals (the highest State Court), which reinstated the judgment (Petition, pp. 19-24).

Question Presented for Review

The petition presents for review the question whether the decision of the Court of Appeals operates to deny to petitioners the constitutional guarantees of the Fourteenth Amendment.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. A. 1257, subd. 3 as amended by the Act of June 25, 1948.

Respondent's Opposition

The petition is opposed on the grounds that:

(1) The petition is untimely.

(2) No Federal question was presented, passed upon or determined.

(3) Jurisdiction has not been validly invoked.

POINT I

The Petition Is Untimely

By 28 U. S. C. A. 2102, subd. C, petitioners were required to apply for the writ within ninety days after the entry of the judgment or decree sought to be reviewed.

Petitioners assert that they seek a review of the decision and order of the Court of Appeals dated July 11, 1956 (Petition, p. 2). They were therefore required to apply for a writ not later than October 9, 1956.

And if, despite the foregoing, September 5, 1956 (the date of filing of the Appellate Division order reinstating the judgment), be considered as or determined to be the controlling date, then the application should have been filed not later than December 4, 1956.

The petition herein was filed on December 13, 1956; it is therefore untimely and may not be granted.

Lastly and perhaps unnecessarily, we refer to the order denying reargument which petitioners have included as part of their appendix (p. 18). They make no express claim that the date of this order—October 18, 1956—is or should be the controlling date, but its inclusion may perhaps be construed as a suggestion by petitioners that their time to apply for the writ commenced on October 18, 1956.

This suggestion—if such it be—is without merit because:

(1) Such order did not decide anything not theretofore determined and therefore (for the purpose of a petition for certiorari), the judgment or decree was final by July 11, 1956.

In support, reference is respectfully made to *Market Street Railway Company* v. *Railroad Commission* (324 U. S. 548) in which this Court held that its

> "jurisdiction to review a state court judgment is confined by long standing statute to one which is final. Judicial Code Sec. 237, 28 U. S. C. A. 344, 8 FCA title 28, Sec. 244. Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps herein. It must be the final word of a final court, * * * Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment."

The judgment here became final in both senses on July 11, 1956.

(2) An order denying reargument is not appealable and does not extend appellant's time in any case where such time is limited. (*Ecco* v. *Amtorg*, 276 A. D. 1080; *Sherman* v. *P & Q*, 277 A. D. 782). Appellants may not unilaterally and without authority extend their time to petition for a writ by the device of a motion for reargument.

(3) The order denying reargument (Appendix, p. 18) did not specify the grounds therefor. Necessarily, however, the decision must have rested upon a non federal ground since no federal question was raised prior to reargument (Petition, pp. 2 and 3).

Reargument having been denied, it logically follows that the federal question, raised for the first time on reargument, was not considered. At any rate, it does not appear that the determination of this question was necessary to the decision and therefore jurisdiction should be declined. (*Ellis* v. *Dixon*, 349 U. S. 459.)

POINT II

No Federal question was presented, passed upon or determined.

Petitioners assert and respondent agrees that the sole question in the State Courts was whether this action of foreclosure was subject to the New York Statute of Limitations (Petition, p. 3).

The Court of Appeals held that since the New York City Charter (Sec. 172) and the New York City Administrative Code (415(1)-7.0) provided that the lien of the tax persists until paid and that nothing short of payment will discharge such lien, the general limitation statutes of New York Civil Practice Acts 47a or 48(2) did not apply.

Clearly, this is not a Federal question for all that was here presented and passed upon is the construction and applicability of New York State statutes. (State Court opinions, petition appendix, pp. 19 to 27.)

No certificate was made by the State Court showing the presence of a Federal question nor does it affirmatively appear from the record that a Federal question was presented and necessarily determined. The record is therefore insufficient to warrant review and the writ should therefore be denied. (*Honeyman* v. *Hanan*, 300 U. S. 14; appeal dismissed 302 U. S. 375; *Ellis* v. *Dixon*, 349 U. S. 458.)

POINT III

Jurisdiction Has Not Been Properly Invoked

Petitioners invoke jurisdiction under 28 U. S. C. A. 1257 subd. 3, which in its pertinent part, provides

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

At no time have petitioners claimed that any of the statutes here involved is repugnant to the Constitution, treaties or laws of the United States.

On the motion for judgment and on the successive appeals therefrom, petitioners contended that this action was subject to Secs. 47 and 48 of the Civil Practice Act. The Court of Appeals held that these sections did not apply.

Petitioners' disappointment with or objection to the construction of the Statutes involved, their interpretation and effect cannot be made the basis for review. These are purely local and non-federal questions.

In any event, the record does not disclose the statutory repugnancy referred to in Sec. 1257.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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